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No. 143
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In the Supreme Court of the United States

OCTOBER TERM, 1961

GRANNIS & SLOAN, INC., AND CONTRACTORS MACHINERY COMPANY, PETITIONERS

v.

THE RENEGOTIATION BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINION BELOW

The determination of the Tax Court, filed on February 5, 1960 (T.C. Memo. 1960-12), is not published. The opinion of the United States Court of Appeals for the Fourth Circuit (Pet. App. 18-20) is reported at 285 F. 2d 908.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 1961. By order of the Chief Justice,

the time for filing a petition for a writ of certiorari was extended to June 11, 1961. The petition was filed on June 10, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a determination by the Tax Court, under the Renegotiation Act, of the amount of a government contractor's excessive profits is subject to judicial review by the court of appeals.

STATUTE INVOLVED

50 U.S.C. App. 1191(e)(1), part of the Renegotiation Act, provides in pertinent part as follows:

> Any contractor or subcontractor aggrieved by an order of the Board determining the amount of excessive profits received or accrued by such contractor or subcontractor may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the mailing of the notice of such order under subsection (c)(1) of this section, file a petition with The Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency. The court may determine as the amount of excessive profits an amount either less than, equal to, or greater than that determined by the Board. A proceeding before The

> Tax Court to finally determine the amount, if any, of excessive profits shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding de novo. * * *

STATEMENT

Pursuant to the Renegotiation Act, 50 U.S.C. App. 1191, *et seq.*, the Renegotiation Board determined that petitioners had realized $75,000 in excessive profits from their renegotiable business in the fiscal year ending December 31, 1952. Petitioners appealed to the Tax Court. A *de novo* trial was held and the Tax Court determined that the amount of petitioners' excessive profits was $75,000. Petitioners then sought review of the Tax Court determination in the United States Court of Appeals for the Fourth Circuit. In that court petitioners attacked the Tax Court's treatment of certain receipts and expenses in computing profits on renegotiable business. However, no constitutional issue was raised and no question was presented as to the renegotiability of the contracts involved. The court of appeals held that it lacked jurisdiction to review the determination of the amount of excessive profits realized on renegotiable business, and dismissed the petition for review (Pet. App. 20).

ARGUMENT

1. The determination by the Tax Court of the amount of excessive profits on renegotiable business is not judicially reviewable. The statute so provides

in clear and unequivocal terms, *i.e.*, the Tax Court "shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, *and such determination shall not be reviewed or redetermined by any court or agency*" (emphasis added). 50 U.S.C. App. 1191(e)(1), *supra*, p. 2. In *United States* v. *California Eastern Line*, 348 U.S. 351, 354-5, this Court stated explicitly that a determination of the amount of excessive profits is nonreviewable. The courts of appeals have likewise refused, on the ground of lack of jurisdiction, to review such determinations, including all issues of law and fact going to the amount of excessive profits. *Psaty and Fuhrman, Inc.* v. *Stimson*, 182 F. 2d 985 (C.A. D.C.); *Eastern Machinery Co.* v. *Under Secretary of War*, 182 F. 2d 99 (C.A. D.C.); *Ebco Manufacturing Co.* v. *Secretary of Commerce*, 221 F. 2d 902 (C.A. 6). See, also, *Vaughn Machinery Co.* v. *Renegotiation Board*, 273 F. 2d 235 (C.A. 6); *United States* v. *Martin Wunderlich*, 211 F. 2d 433 (C.A. D.C.); *Knu-Vise* v. *War Contracts Price Adjustment Board*, 195 F. 2d 198 (C.A. D.C.); *Lowell Wool By-Products Co.* v. *War Contracts Price Adjustment Board*, 192 F. 2d 405 (C.A. D.C.); *U. S. Electrical Motors* v. *Jones*, 153 F. 2d 134 (C.A. D.C.). Thus, the decision below is clearly correct, and there is an accord, rather than a conflict, of circuits.[1]

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[1] The 1956 amendment to the Renegotiation Act (50 U.S.C. App. 1218 (a) (Pet. App. 21)), enlarging the *venue* of appeals from Tax Court renegotiation decisions, did not enlarge the *jurisdiction* of the courts of appeals to review

2. Since the Renegotiation Act antedated petitioners' government contracts, it is apparent that petitioners entered into those contracts anticipating and agreeing to renegotiation, as well as to the finality of the Tax Court's determination of the amount of excessive profits. Petitioners should not now be heard to complain about the procedures they voluntarily accepted for determination of excessive profits on their contracts with the government. Cf. *United States* v. *Wunderlich*, 342 U.S. 98;[2] *Booth Fisheries Co.* v. *Industrial Commission*, 271 U.S. 208. See, also, *United States* v. *Strontium Products Co.*, 68 F. Supp. 886, 887 (S.D. W. Va.).

Moreover, it should be noted that the constitutional question which petitioners now seek to raise in this Court, was not properly presented to the court below. In any event, the argument is clearly without merit with respect to the Renegotiation Act, as the courts have several times held. *United States* v. *California*

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such Tax Court determinations. The amendment merely provides for venue, in an appropriate circuit, of appeals from Tax Court decisions, "to the extent subject to review". There was no purpose to alter the prior rule that the courts of appeals are without authority to review Tax Court renegotiation decisions except on issues going to the jurisdiction of the Tax Court, *e.g.*, the existence of renegotiable contracts.

[2] Under the so-called "Wunderlich" Act, 41 U.S.C. 321, the finality of administrative determinations under government contracts is not judicially reviewable unless fraudulent, capricious, arbitrary or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence.

[3] Other statutory provisions granting finality to administrative determinations have been upheld against attacks on

Eastern Line, 348 U.S. 351; *Spaulding* v. *Douglas Aircraft Co.*, 154 F. 2d 419, 427 (C.A. 9);[1] *Eastern Machinery Co.* v. *Under Secretary of War*, 182 F. 2d 99 (C.A. D.C.); see *Lichter* v. *United States*, 334 U.S. 742, 787-788.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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the basis of a claimed denial of due process. *Ludecke* v. *Watkins*, 335 U.S. 160; *Williamsport Wire Rope Co.* v. *United States*, 277 U.S. 551; *Plymouth Coal Co.* v. *Pennsylvania*, 232 U.S. 531; *Reetz* v. *Michigan*, 188 U.S. 505; *Brasier* v. *United States*, 223 F. 2d 762 (C.A. 8), certiorari denied, 350 U.S. 913; *American Fed'n of Labor* v. *National Labor Relations Board*, 308 U.S. 401; *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297, 303; *United States* v. *Binghamton Construction Co.*, 347 U.S. 171.

[1] "The Constitution does not require the Congress to give to any litigant a right of appeal. Assuming that the Tax Court is no more than an administrative body, the finality of its decisions as to the amount to be recaptured violates no constitutional right."

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